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Decision 01-08-040 August 23, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Robert Hambly, et al. Complainant, vs. Hillsboro Properties and City of Novato, Defendants.	Case 00-01-017 (Filed January 14, 2000)

Benjamin H. Scharf, Attorney at Law, for Robert Hambly, et al., complainants and for Golden State Mobilehome Owners' League, Inc., intervenor.
David L. Spangenberg, Attorney at Law, for Hillsboro Properties, and Jeffrey A. Walter, Attorney at Law, for City of Novato, defendants.
Edward G. Poole, Attorney at Law, for Western Manufactured Housing Communities Association, intervenor.

OPINION RESOLVING COMPLAINT

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Summary

We resolve the complaint filed by Robert Hambly against both Hillsboro Properties (Hillsboro), the owner of the Los Robles Mobilehome Park (Los Robles), and the City of Novato (Novato). Hambly claims that Hillsboro has assessed the Los Robles tenants annual rent increases which, though approved by Novato under its rent control authority, result in higher charges for submetered natural gas and electric service than Pub. Util. Code § 739.5 permits.[1] After reviewing appeals of the Presiding Officer's Decision (POD) filed by Hillsboro and Novato, as well as a late-filed response by Western Manufactured Housing Communities Association (WMA) and an additional, joint response filed by Hambly and the Golden State Mobilehome Owners League, Inc. (GSMOL), we confirm the POD's conclusion that Hambly is correct.

However, in deference to Novato's assertion that its municipal rent control law does not expressly provide a mechanism for reopening final rent determinations, we revise the process for obtaining an accurate calculation of the refunds. We reject the POD's recommendation that Hillsboro apply to Novato for a rent adjustment and instead direct Hillsboro to make the refund calculations itself, consistent with the methodology set forth in this decision, and subject to review by Hambly and our further oversight. Thereafter, Hillsboro shall refund to its tenants with interest, beginning three years before the date the complaint was filed, all rents charged in violation of § 739.5 and Commission decisions interpreting that statute.

[1] Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code and all citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

We have also revised the POD to correct the discussion of the mobilehome park master-meter tariffs and the discount provided by those tariffs. Finally, we have revised the discussion of park owners' participation since 1995 on master-meter issues in generic utility proceedings.

Procedural Background

The complaint was filed on January 14, 2000 and defendants filed timely answers. By ruling on March 17, the assigned Administrative Law Judge (ALJ) directed the parties to brief the Commission's subject matter jurisdiction to adjudicate the dispute and to prepare for a prehearing conference (PHC) to address that preliminary issue, and others as necessary. At the May 10 PHC, after ruling that this complaint is within the Commission's subject matter jurisdiction, ALJ Vieth and Commissioner Wood, the Assigned Commissioner, dealt with various procedural matters. On May 17, Commissioner Wood issued a scoping memo as required by § 1702.1. The scoping memo memorialized the PHC rulings, including the direction to Hambly to file an amended complaint to correct the name of complainant and to substitute defendant Novato for the named Redevelopment Agency.[2] The scoping memo also identified issues for hearing, set a procedural schedule, and designated ALJ Vieth the presiding officer for this case. Hambly filed a First Amended Complaint on June 2.

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[2] Complainant filed the original complaint in the name of the "Los Robles Mobile Home Park, Chapter 393 of the Golden State Mobilehome Owners League" against Hillsboro and the "City of Novato Redevelopment Agency". Counsel for the GSMOL appeared at the PHC for the limited purpose of challenging complainant's right to bring the action in the chapter's name. Counsel appearing for the City of Novato Redevelopment Agency claimed it had been incorrectly named as a defendant and requested its dismissal, since the City, and not the Redevelopment Agency, adopted

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On June 30, the GSMOL moved to intervene in this case. The ALJ granted limited intervention. Thereafter, GSMOL's counsel assumed representation of Hambly, as well, and filed a Notice of Appearance on August 11.

Evidentiary hearing occurred in San Francisco on August 21, 2000, and at the request of the parties was continued to October 19. On October 25, Hambly filed a motion requesting extension of the 12-month deadline for resolution of this case and the Commission granted the extension in Decision (D.) 00-12-025. The parties filed concurrent opening briefs on December 14, 2000. Hambly and Hillsboro filed concurrent reply briefs on January 11; Novato's reply brief was served on January 11, but not filed until January 17, 2001, whereupon this case was submitted for decision. WMA filed a request for leave to intervene, for limited purposes, on June 28. The ALJ granted the intervention and resubmitted this case.

Overview: Factual Background and Controlling Law

As relevant here, § 739.5 requires a master-meter customer, such as Hillsboro, to charge mobilehome park tenants "the same rate" the utility would charge those tenants if it provided them natural gas and electric service directly.[3]

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and administers the municipal rent control ordinance at issue. Counsel agreed to accept service for Novato.

[3] Section 739.5(a) provides:

> The commission shall require that, whenever gas or electric service, or both, is provided by a master-meter customer to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-meter customer shall charge each user of the service at the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation. The commission shall require the corporation furnishing service to the master-meter customer to establish uniform rates for master-meter service at a

Footnote continued on next page

The master-meter rates are discounted to cover the "reasonable average costs" of providing the submeter service, based on the costs the utility avoids. The Commission has exclusive jurisdiction to administer § 739.5 and to set the rates the statute authorizes.

In 1995, the Commission extensively reviewed the application of § 739.5 and the calculation of the master-meter discount. In Ordering Paragraph 1 of its decision, the Commission held that "§ 739.5 expressly limits master-meter mobile home park owners [sic] recovery of costs of owning, operating, and maintaining a submetered system to the reimbursement provided by the submeter discount." (See *Re: Rates, Charges, and Practices of Electric and Gas Utilities Providing Services to Master-metered Mobile Home Parks* [*Rates, Charges, and Practices*], D.95-02-090, (1995) 58 CPUC2d 709; rehrg. denied D.95-08-056, 61 CPUC 2d 225.) In other words, the park owner may not recover any actual or perceived shortfall through surcharges or rent increases.[4] In its decision denying rehearing, the Commission focussed on the "key … that submetered customers are to be treated the same as directly metered customers." (*Rates, Charges, and Practices*, rehrg. denied, 61

> level which will provide a sufficient differential to cover the reasonable average costs to master-meter customers of providing submeter service, except that these costs shall not exceed the average cost that the corporation would have incurred in providing comparable services directly to the users of the service.

[4] The statutory components of the discount (because they comprise the reasonable costs of owning, operating, and maintaining the submetered systems) include "a factor for investment-related expenses for all initial and ongoing capital upgrade costs," and "depreciation of the average installed cost of the equivalent distribution system which the utility has installed in its directly metered parks, return on investment, income taxes on the return, and property (ad valorem) taxes." (*Rates, Charges, and Practices*, rehrg. denied, 61 CPUC2d 225, 231 citing D.92-02-090, p. 19 (slip op.).)

CPUC2d 225, 231.) Theoretically, the Commission opined, those costs, if any, which are not statutorily required to be considered in the discount – and which

directly metered tenants pay in rents –may be recovered from submetered tenants in rents. However, the Commission was unable to ascertain, based on the record before it in 1995, whether or not there are any such costs and directed park owners to raise this issue "in the next GRCs [utility general rate cases], so that all parties have an opportunity to litigate the matter."[5] (*Ibid.*)

Mobilehome parks in Novato are subject to a municipal rent control law, the Mobilehome Rent Control Ordinance, which is Chapter XX of the Novato Municipal Code. Section 20-5 of the rent control ordinance provides for an automatic, annual rent adjustment by an amount equal to 75% of the annual change in the consumer price index (CPI) over the base year. Park owners who conclude this adjustment does not provide a fair return on investment may petition, annually, for an individualized rent adjustment – good for one year -- equal to 100% of the change in the CPI. Such a petition, brought under § 20-9 of the ordinance, must be based on various approved formulae, including the maintenance of net operating income (NOI) formula. Section 20-12 of the ordinance, appended to this decision as Attachment A, defines NOI as gross income less operating expenses (which *include* utility costs the tenants do not pay but *exclude* utility costs covered by the master-meter discount). Under the maintenance of NOI formula, a park owner's rent increase petition is based on the park's NOI in the base year, 1995, which is the last full calendar year before

[5] In its rehearing application, WMA, (then known as the Western Mobilehome Parkowners Association), to which Hillsboro belongs, had argued that costs which are not statutorily required to be considered in the discount include costs under utility Line and Service Extension Rules and costs of installation, repair, upgrade or replacement of common area electrical facilities. As noted in the text of this decision, immediately above, the Commission directed park owners to raise these issues in subsequent utility GRCs.

Novato's rent control law took effect. The base year NOI is presumed to provide a fair return on the property.

Beginning in 1996, Hillsboro has filed an annual petition for a rent increase using the NOI formula. Hambly filed this complaint on behalf of himself and the other tenants at Los Robles, a 213-space mobilehome park in Novato, within the service territory of Pacific Gas and Electric Company (PG&E). Hambly seeks refunds for utility expenses which he claims have been wrongfully included in rent and urges the Commission to suggest certain revisions of Novato's rent control ordinance.

The Commission has acknowledged it has no rent control authority. (See *Rates, Charges, and Practices*, at 58 CPUC2d 709, 718.) However, lack of rent control jurisdiction does not limit the CPUC's utility-rate control jurisdiction.

> That the PUC lacks rent control jurisdiction does not mean rent control boards are free to ignore its rulings concerning utility rates. The rationale of *Rates, Charges, and Practices* applies to rent-controlled parks as much as to parks that are not subject to rent control." (*Rainbow Disposal* (1998) 64 Cal. App 4th 1159, 1167.)

Clearly the Commission has subject matter jurisdiction over the issues in contention between the parties, and following the PHC, Hillsboro abandoned its claim that the Commission does not.

Issues in Dispute

The scoping memo identified the second of three disputed issues central to this case as "[w]hether Hillsboro has improperly included in its rent increase petitions any expenses for maintenance, repair or upgrade of the Los Robles submeter system". Hambly and Hillsboro later narrowed this aspect of the dispute by stipulating that the tenants' challenge was limited to the inclusion of costs associated with trenching to lay conduit for park street lighting and costs attributable to work on electric pedestals (the structures that hold the submeters

for each mobilehome site). Hambly agreed that other expenses, undisputedly related to maintenance and operation of the submeter system, either had not been included in Hillsboro's petitions or had been removed from them by the rent control hearing officer. Thus, the issues before the Commission were reduced to two:

1. Whether operation of the NOI formula in Novato's rent control ordinance results in higher gas and electricity charges for submetered mobilehome tenants than the rates applicable to mobilehome customers directly served by PG&E.
2. Whether the following expenses are included within the master-meter discount: (a) the trenching and conduit required for overhead street lighting; and (b) installation, maintenance and repair of electric pedestals.

Discussion

1. Treatment of Utilities in the Rent Control Record

The evidence establishes that Novato authorized individualized rent adjustments at Los Robles which resulted in the rent increases assessed in 1997 (for the 1996 petition year), 1998 (for the 1997 petition year), and 1999 (for the 1998 petition year) of $33.27, $42.46, and $54.32 per space per month, respectively. Hillsboro's 1999 petition for a rent increase in 2000 is pending but no decision has issued. In order to better grasp the parties' positions on the two issues remaining for resolution, we recount how utility income and expenses have been treated in Novato's rent control record. Though the underlying facts are undisputed, the parties differ over their significance.

We start by identifying the utility components and calculation of the 1995 base year NOI established for Los Robles, since that NOI multiplied by an inflation figure is the basis for rent adjustments in subsequent years. Hillsboro

filed the income and expense data required to establish a base year NOI as part of its 1996 petition.[6] Base year utility income exceeded utility expenses by $28,211. Therefore, this utility differential or "gap" of approximately $28,000 became the fair return yardstick in Hillsboro's 1996 and subsequent petitions.

As approved by Novato, Hillsboro's base year calculations included as utility *income* the income from all utility services except water, i.e. sewer, trash, and submetered gas and electricity. Water was excluded because it is provided with the rent, unlike sewer service and trash collection, which are billed to tenants on a pro rata basis as a separate line item on the rent bill. Hillsboro bills tenants for submetered gas and electricity in accordance with PG&E's applicable mobilehome park tariffs, GT and ET. The approved utility *expenses* for the base year included Hillsboro's costs for water, sewer, trash, and the master-meter gas and electricity bill.

Hillsboro's witness Wagner, whom it employs as the offsite property manager for Los Robles, testified that PG&E submits to Hillsboro, on a monthly basis, a single master-meter bill for all gas and electric usage at the mobilehome park. In other words, the tenants' individual usage and the common area usage (which includes streetlighting, the pool, and the clubhouse) is not differentiated or broken out in any way at the master-meter. Though it is not calculated on the bill, the volumetric difference, on a therms/day or kilowatt-hour (kWh) basis, between the master-meter bill and the total of the submeter bills represents the common area gas or electric usage. Hillsboro does not bill tenants directly for

[6] Novato approved a base year NOI of $825,113.

common area usage, however, but recovers these costs through the rent control process. Hillsboro does bill tenants for their submetered usage and, according to

Wagner, each month Hillsboro's receipts from the submeter charges exceed the master-meter bill for total usage. This is not at all surprising, since in accordance with § 739.5, PG&E's gas and electric tariffs for master-metered mobilehome parks provide the master-meter operator with a discount for operating and maintaining the submeter system. The discount is a per space per-day allowance that is factored into the computation of the total gas and electric charges on the monthly master-meter bill.

What is the cause of the approximately $28,000 "gap" between base year utility income and expenses? Because the sewer and trash charges simply "pass through" to each tenant a pro rata share of the total amount the service providers bill Hillsboro, these items have no net effect on the NOI calculation. Hillsboro and Hambly agree that the remainder necessarily is attributable to either water costs or common area gas and electric costs, or both, but the rent petition lacks the detail required to determine the cause. Apparently, Hillsboro has not retained the records necessary to reconstruct the individual components of its utility expense total and was unable to obtain copies of its master-meter bill for that time period from PG&E. While Hillsboro challenges the tenants' estimate that the expense of common area usage is approximately 10% of the master-meter bill, Hillsboro has provided no alternative proxy for common area usage.

As described by Hambly's expert Baar, an urban planner, lawyer, and rent control consultant to cities and other rent control proponents, Novato's rent control ordinance operates as "… a preservation of prior net operating income levels with some kind of adjustment to them for inflation, et cetera". (Tr. 207.) Hillsboro has been authorized rent increases in the petition years because its NOI in each of those years has been less than the inflation-adjusted base year NOI.

The rent control record indicates that rent increases have been partially attributable to reduced *net* utility income in the petition years (on average about $2,750 each year) compared to $28,000, approximately, of *net* utility income in the base year.

2. Problems with the NOI Formula

At evidentiary hearing, the issue of "whether" operation of the NOI formula in Novato's rent control ordinance is problematical became the issue of "how." Hillsboro's expert St. John, an economist and rent control consultant to owners, conceded that operation of the NOI formula adds an inflation figure to the master meter discount.[7] The resulting excess in rents, according to St. John's calculations, are $1.34 per space per month for the 1996 petition year, $1.96 per space per month for 1997, and $2.82 per space per month for 1998.[8] As a permanent solution, St. John proposed that the ordinance be amended to remove the discount from base year and petition year NOI calculations.

In his prepared rebuttal testimony, Baar commented:

> When Dr. St. John's [original] approach is used in applying Novato's fair return standard, the differential between the

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[7] The work of both Baar and St. John on the subject of "maintenance of net operating income" is referenced in Ex. 104, a Sonoma County rent control primer which Hillsboro introduced in this proceeding during cross-examination of Baar.

[8] St. John's calculations assume a constant gas discount (.34464 $/therm) and constant electric discount (.343 $/kWh) for the 1996-1998 petition years. His refund figures are based on the following three calculations: (gas discount rate x 365 days x 213 spaces) + (electric discount rate x 365 days x 213 spaces) = total discount in petition year; total discount in petition year x change in CPI over base year = inflation on discount for petition year; inflation on discount for petition year ÷ 12 months ÷ 213 spaces = overcharge to each tenant in petition year.

In fact, the gas and electric discount rates were not constant during this time period and St. John's calculations require revision accordingly.

> income and expenses in the base year is built into the fair net operating income that is defined as necessary for a fair return in all current years. If base year gas and electricity expenses are included in computing base year net operating income, as proposed by Dr. St. John, in the current year the parkowner would have a right to maintain all of the net operating income that was yielded by gas and electricity in the base year. (Ex. 24)

On cross-examination, Baar agreed that St. John's proposed solution would neutralize the effect of inflating the discount. But absent proof of the charges for the master-meter gas and electricity bill, he could not assess whether St. John's proposed adjustment would be adequate to achieve compliance with § 739.5.

Baar's point of view is shared by Hambly's witness Kirste, an actuary who assisted the Los Robles tenants, on a pro bono basis, at the rent control hearings on the 1998 petition year and is representing them on a subcommittee convened by the Novato city council to consider revisions of the rent control ordinance. Kirste prepared a series of calculations, referred to in the record as "sensitivity analyses", which purport to illustrate the impact on base year and petition year NOIs – and the resulting petition year rent adjustments -- of including utility income and expenses, or excluding them. Kirste admits that his calculations are not based on the inputs or final figures that the Novato rent control hearing officer approved, but rather on Hillsboro's unadjusted petitions. Moreover, some of the calculations include an allowance for common area gas and electricity usage (which Hambly concedes Hillsboro is entitled to recover), based on the tenants' assumptions that the volume of that usage is approximately 10% of the park total. While Kirste's calculations do not attempt to compute the refund owed the Los Robles tenants, what they show, as logic would expect, is that Los Robles rents would be lower if utility income and

expenses were removed entirely from the NOI calculations. We have already seen that only sewer and trash are passed through to tenants on a pro rata basis and that submetered gas and electric usage is directly billed. Water, on the other hand, is included with rent; thus, any increase in water expenses in petition years is recovered through the NOI formula. This is the same way Hillsboro has recovered common area gas and electric charges, or, in Baar's words "usage that the residents are not billed for". (Tr. 213.)

Though their expose of the admittedly complex interaction of these two disparate regulatory regimes could be clearer, Hambly's witnesses have a point that the NOI formula, as it has been applied by Novato, yields a problematic measure of the gas and electric components of *net* utility income. Essentially, Novato has recognized submetered receipts as an allowed income item and subtracted, as an allowed expense item, the master-meter bill. As we have already seen, these two items do not cancel one another as do trash and sewer. On the other hand, their difference, on a dollar basis, does not provide an accurate measure of gas and electric common area usage, which is the *only* gas and electric usage expense not otherwise reimbursed. This is because the income component -- the submeter receipts -- represents only part of the total park usage and is a function of the volume of that usage x PG&E's tariffed residential rate.[9] The expense component -- Hillsboro's master-meter bill – consists of total park usage, that is, the combined charges for *both* tenant and common area usage. PG&E computes the master-meter bill by calculating all usage in accordance with the residential rate schedule and then offsetting this charge by the per space per-

[9] PG&E's tariffs for master-metered mobilehome park service and directly metered residential service contain the same residential rate schedules.

day master-meter discount. Pursuant to § 739.5(a), the master-meter discount provides the "differential to cover the reasonable average cost to master-meter customers of providing submeter service."

As noted previously, *Rates, Charges, and Practices,* which focuses on the submeter charges to tenants, clearly states that the master-meter discount is the park owner's only source for recovery of the costs of operation and maintenance of the submeter system. We are unable to determine on this record whether St. John's proposal (i.e., removing the value of inflation on the master-meter discount from past rent increases) is adequate to ensure fidelity to § 739.5. As Hambly's witnesses note, the master-meter discount is not an input in the NOI – rather, St. John's proposal calculates the value of the discount separately, and then backs it out of the authorized rent increases. Given proof that operation of Novato's rent control ordinance has resulted in no other prohibited increases in gas and electric utility costs, we think the expedient approach would be to order rent adjustments based on St. John's methodology, revised as necessary to include the mobilehome park master-meter rate schedules applicable in each year at issue. However, we lack that proof. Hillsboro argues, unpersuasively, that the failure of proof is Hambly's and requires dismissal of the compliant. Hillsboro confuses the burden of proof with the burden of production. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. (See *Morris v. Williams* (1967) 67 C. 2d 733, 760.) Hillsboro, the party which should have knowledge of the common area usage, has not produced the evidence necessary to substantiate St. John's theory, or a proxy for that evidence.

We conclude that rent refunds are warranted and will require that they be based on the same methodology we urge Novato to adopt going forward in order to disentangle CPUC utility rate setting jurisdiction and its own rent control jurisdiction, as it must. Submetered gas and utility receipts should be excluded as an item of gross income from both the base year and each petition year NOI. Likewise, operating expenses in all NOI calculations should be adjusted to exclude the total master-meter bill but include the amount that represents all common area usage, measured in therms or kWhs and then multiplied in accordance with PG&E's mobilehome park master-meter rate schedule. For those years in which Hillsboro is unable to document the master-meter bill charges necessary to calculate the volume of common area usage, we will accept the tenants' estimate of 10% as a proxy.

3. Questioned Expense Items

Hambly contests Novato's allowance of two kinds of utility expenses in specific petition years. The first kind, allowed in Hillsboro's 1996 petition, are $3,251 in expenses associated with overhead street lighting in the park. These common area expenses consist of conduit and the trenching necessary to lay it. The second kind, disallowed in the 1997 petition but allowed in 1998, are $23,884 in expenses related to repair and replacement of the electric pedestals that support the service panels through which a mobilehome is connected to the electricity supply.[10]

[10] The record reflects that Hillsboro's 1999 petition included $27,395 in pedestal maintenance expenses but as noted previously, Novato has not issued a final rent adjustment order.

3.1 Common Area Expenses: Conduits & Trenching

Common area expenses, such as the challenged conduit and trenching expenses, are those incurred in the course of operation, maintenance, and repair of park common areas, including the pool, clubhouse, and streetlighting system. Hillsboro distinguishes the common areas from the submeter system which provides energy to each of the 213 mobilehome sites at Los Robles. Hillsboro does so because while it directly bill tenants for submetered usage, it does not bill them for common area usage.

In D.95-08-056, when the Commission denied rehearing of *Rates, Charges, and Practices,* it directed park owners to raise, in generic proceedings before the Commission, the question of whether costs associated with common area plant and the like are intended to be included within the master-meter discount. In response to the park owners' rehearing charge that the master-meter discount did not yield them adequate recovery, the Commission stated:

> Thus, if the costs involving the Line and Service Extension Rules of the utilities, and the installation, repair, upgrade or replacement of any common area electrical facilities are required to be considered in calculation of the discount, then the mobile home park owners are barred from recovery of these costs through a rent increase. This is also the case for nonrecovery due to rate limiters.
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> However, if such costs are not statutorily required to be considered in the discount, and directly metered tenants pay for such costs in rents, then submetered tenants should be charged accordingly. The key is that submetered customers are to be treated the same as directly metered customers. As previously discussed, this is the intent of the enactment of Public Utilities Code Section 739.5.
>
> Therefore, the mobile home parks may be permitted to recover costs that are not in any way reimbursed, fully or partially, in the discount, but such recovery should not

> result in treating the submetered customers differently from the directly metered customers. *As to which costs are covered by the statute, the mobile home park owners should raise these particular costs in the next GRCs, so that all parties have an opportunity to litigate the matter in hearings. The record in the instant case is not sufficient to resolve this issue.* (D.95-08-056, 61 CPUC2d at 231, emphasis added.)

John Harnett, a Senior Rates Analyst with PG&E, whom Hillsboro subpoenaed to testify in this proceeding, stated that PG&E does not include the cost of serving common area facilities, like a pool, clubhouse, and streetlighting in calculation of the master-meter discount. Harnett was PG&E's witness in the *Rates, Charges, and Practices* proceeding and testified that he has sponsored prepared testimony and/or workpapers on the master-meter discount for the utility's recent Phase II GRCs.[11]

As Harnett accurately explained, PG&E's mobilehome discount is addressed in Phase II of the utility's GRC proceedings. The cost PG&E avoids when a park is submetered has been calculated based on the average cost to PG&E to directly meter, on a per space basis, a random sample of mobilehome parks within its service territory. In other words, the master-meter discount calculation applies to the facilities which would be the utility's responsibility if the system were not submetered and excludes the facilities that are the customer's responsibility. By comparison, were PG&E to directly meter a mobilehome site, it would establish service to each mobilehome space like any other single-family, residential connection. Under such a scenario, "since it's not residential, [the common area] would be entirely different service, and it would

[11] We note that PG&E was the only utility to espouse the interpretation of § 739.5 which the Commission ultimately adopted in *Rates, Charges, and Practices*.

be paid for just like any other service", Harnett stated in response to questioning. (Tr. 161.)

Harnett testified that in recent Phase II GRCs, the only disputes about the master-meter discount have focussed on issues such as whether the line loss expense allocation was appropriate or whether depreciation amounts were reasonable – not on how to account for common area costs. This testimony was unchallenged at hearing. On brief, GSMOL argues forcefully that by failing to raise common area cost accounting issues in a generic proceeding as the Commission directed in D.95-08-056, Hillsboro's owner, who had participated in the *Rates, Charges and Practices* proceeding, "failed to do what he was told to do." (GSMOL opening brief, p.7.) Hillsboro's reply brief does not address this point directly but cites Harnett's letter to support the proposition that because PG&E does not factor common area costs into the master-meter discount, Hillsboro has acted lawfully to petition Novato to allow recovery of such costs in rent.

The POD rejects this argument. Hillsboro's appeal correctly summarizes the POD's rationale: "She [the presiding officer] did so because Hillsboro had not obtained the commission's final confirmation of this fact in a General Rate Hearing". (Hillsboro appeal, p. 6.) Hillsboro's appeal then argues, for the first time, that park owners have been unable to obtain a generic Commission determination because the rate design portion (Phase II) of PG&E's test year 1996 and test year 1999 GRCs did not go forward. Hillsboro overstates its case. It is true that the rate freeze imposed by electric restructuring legislation in 1996 (Stats. 1996, ch. 854 [Assembly Bill 1890]) limited the kinds of changes which might be made in electric rate design during the pendency of the earlier proceeding. However, Phase II of PG&E's 1996 test year proceeding did go forward before an ALJ, and WMA participated in that proceeding. D.97-12-044,

which resolved Phase II issues, notes that WMA worked with PG&E to update certain studies underlying gas mobilehome park master-meter tariffs but that "[n]o party has proposed changes to the electric master-meter discounts in this proceeding." (D.97-12-044, mimeo at 27; Finding of Fact 20.) Moreover, WMA was not among the parties who filed comments on the ALJ's draft decision, which was issued for comment twice. The appeal filed by Hillsboro and WMA's late-filed response accurately relate that the current electric crises caused the Commission to suspend the 1999 test year proceeding, by ruling of ALJ Mattson dated December 29, 2000. They add that, several months beforehand, while hearings in this case were still underway, WMA distributed prepared testimony on various master-meter issues in Phase II of PG&E's test year 1999 GRC.

The fact remains, however, that Hillsboro has charged its tenants for common area expenses in PG&E's service territory without obtaining Commission authorization to do so. If Hillsboro or other park owners in PG&E's service territory had wished to pursue the master-meter issues unresolved by the 1995 *Rates, Charges, and Practices* line of decisions, they had procedural means to do so. The suggestion that the AB 1890 electric rate freeze precluded them from doing so is unpersuasive. Moreover, Hillsboro's appeal (again, for the first time) points to Commission decisions which refine master-meter discount calculations in recent Biennial Cost Allocation Proceedings (BCAPs) for the Southern California Gas Company (D.97-04-082; D.00-04-060) and San Diego Gas & Electric Company (SDG&E; the relevant decision is also D.00-04-060), as well as in SDG&E's recent rate design window proceeding (D.00-12-058).[12] Clearly, park

[12] In their response to the appeal, Hambly and GSMOL suggest that because the resolutions of the master-meter issues adopted in these decisions were the product of

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owners in those proceedings were aware of the master-meter issues the Commission left unresolved in 1995.

Harnett's testimony about PG&E's current computational practice, together with the respective contentions of the parties, point to the relationship between the master-meter discount and line extension allowances. The record in this proceeding is not only substantively inadequate to revise either formula, but also underscores the importance of a broader, generic review. There is no dispute that Hillsboro has incurred expenses for electrical conduit and trenching, but it has done so at its peril, having determined to ignore D.95-08-056. In light of the foregoing, we conclude that the $3,251 in Hillsboro's 1996 petition for conduit and the trenching necessary to lay it, must be disallowed as an item of NOI expense.

3.2 Electric Pedestals

The rent control hearing officer allowed electric pedestal expenses in the 1998 petition because Hillsboro supported this claim with a letter to its counsel from PG&E's Harnett. The letter, dated July 28, 1999, states, in relevant part:

> I have been asked to identify PG&E policy relative to electric pedestals in mobilehome parks where PG&E directly services the customers (mobilehome park residents).
>
> After researching the matter, I have determined that in directly served mobilehome parks, it is the responsibility of

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settlements in proceedings in which mobilehome park tenants organization were not expressly invited to participate, the validity of these decisions is questionable. However, like any other special interests, mobilehome park tenants organizations have the capacity to monitor Commission proceedings and to participate in those where issues of concern to their members are litigated. It is no mystery that the Commission reviews rate design issues in BCAPs and electric rate design window proceedings.

> the builder of the mobilehome park to install the electric service panel including the pedestals which support the electric service panels … After construction, the electric service panels and the associated pedestals continue to be owned by the mobilehome park owner and are not part of the PG&E electric distribution system. As such, the mobilehome park owner is responsible to repair, maintain, and replace the electric pedestals.
>
> Since the park owner is responsible to maintain the electric pedestals in a directly served mobilehome park, maintenance of such pedestals is not included within the calculation of the electric submetering discount allocated to master metered mobilehome parks. (Ex. 100.)

Harnett stated that the letter was intended to be a factual response to the narrow question posed by Hillsboro's counsel and was not an opinion as to whether mobilehome park tenants should be paying for pedestal expenses in rent. According to Harnett, in recent Phase II GRCs PG&E has never included the expenses for electric pedestals as an avoided cost (similar to the treatment of common area expenses) and no party has questioned whether or not they should be included.

We see no material difference between the issues associated with treatment of electric pedestal expenses and those associated with expenses for common areas. Even if electric pedestals properly are not components of the master-meter discount, they nonetheless implicate line extension allowances. Again, Hillsboro has ignored the direction of D.95-08-056. In the context of this proceeding, we conclude that the 1998 petition expenses of $23,884 for repair and replacement of the electric pedestals, must be disallowed as an item of NOI expense.

4. Reparations

In summary, the excess rents Hillsboro must refund, on a pro rata basis to the Los Robles tenants who paid them, is the difference between the rents actually charged and the rents which should have been charged. In order to avoid violating § 739.5, the rents which should have been charged are to be calculated by:

- Adjusting the utility income and expense inputs to base year and petition year NOIs as described in Section 2, above;
- Removing $3,251 in utility expenses (electrical conduit; trenching) from the 1996 petition; and
- Removing $23,884 in utility expenses (electric pedestals) from the 1998 petition.

We direct Hillsboro to calculate, in accordance with these three determinations, the reimbursements owed its tenants for the period beginning January 13, 1997, which is three years before the date Hambly filed this complaint at the Commission. (See § 736.). All reimbursements shall include interest at the prime three-month commercial paper rate, compounded monthly, until the date of refund. Within 45 days of the effective date of this decision, Hillsboro shall file a report with these calculations as a compliance filing and shall serve it on the service list for this proceeding. Within 30 days thereafter, Hambly and Hillsboro shall meet and confer to discuss the inputs and methodologies used in making the calculations, in a good faith effort to explore and reconcile any differences between them. Within 30 days of this meeting, Hambly shall then file, in the alternative, a notice of acceptance of the calculations or separate calculations performed in accordance with our determinations.

We establish this process in deference to Novato's assertion, also argued by Hillsboro, that Novato's municipal rent control law does not expressly provide a mechanism for reopening final rent determinations. Thus, because we reject the POD's recommendation that Hillsboro apply to Novato for a rent adjustment, we have no need to reach the legal arguments raised on this point by either Novato or Hillsboro. We have provided the parties with clear directions as to how the refund calculations are to be made. Both parties participated in the hearings before the Novato rent control board and both parties have access to the rent board's record. Thus the parties have all the information they need to promptly and accurately calculate the refunds owed.

Should Hambly file a notice of acceptance of the calculations, we direct the Executive Director thereafter to close this proceeding by Executive Director's order. Otherwise, we direct the ALJ to order additional proceedings, as the ALJ determines necessary, to resolve the discrepancies between the parties.

Once the refunds are quantified, Hillsboro shall reimburse its current tenants and shall make a good faith effort to identify and reimburse any former tenants or their heirs for excess rents paid since January 13, 1997, including interest as calculated above. All refunds not collected within 12 months of the date quantification is accepted by Hambly or approved by the Commission, as applicable, shall revert to the General Fund of the State of California.

At the end of the 12 month period, Hillsboro shall inform current tenants, by letter with a copy to the Director of the Commission's Consumer Services Division, of the status of its refund program and inform the tenants of the steps it has taken to turn over any uncollected refunds to the General Fund.

Implications for Other Parks Owned by Hillsboro

The record indicates that Hillsboro owns other master-metered mobilehome parks within the service territories of gas and electric utilities regulated by this Commission. In a prior case where we held that mobilehome park owners, who owned a number of parks within California, had unlawfully assessed surcharges to cover the costs of undergrounding a gas and electric system at one park, we directed the owners to examine their practices at the other parks and make appropriate adjustments. (See *Home Owners Association of Lamplighter v. Lamplighter Mobile Home Park* (1999) D.99-02-001.) This decision shall also serve as notice to Hillsboro that Los Robles-type treatment of common area expenses and electric pedestals in other rent control jurisdictions may be unlawful. We advise Hillsboro to examine its practices at other parks, amend its future rent control applications where appropriate, and to implement refunds where warranted.

Requests for Official Notice

Finally, we address two requests for official notice still outstanding. Hambly's December 7, 2000 filing asks us to notice three rent control documents attached to the filing: the City of Carson's Guidelines for Implementation of the Mobilehome Space Rent Control Ordinance and Application For Mobilehome Space Rent Increase; and Chapter 9.80 of the City of Sonoma's Municipal Code, entitled Mobilehome Park Space Rent Protection. Pursuant to Rule 73 the Commission may take official notice of such documents and we will do so, as Hambly requests, for the limited purpose of "reference and commentary" in briefing.

Hillsboro's January 11, 2001 request asks us to notice PG&E's residential gas tariff rates from January 1, 1987 through January 7, 2000 and residential

electric tariff rates from July 15, 1993 through January 7, 1998. We grant Hillsboro's request with respect to all periods relevant to this complaint. On our own motion, we take notice of PG&E's residential electric tariff rates in effect through year-end 1998.

Appeals

On June 1, 2001, Novato and Hillsboro each filed an appeal of the POD and on June 18, Hambly and GSMOL filed a joint response. On June 28, WMA filed a petition to intervene, requesting leave to file, late, a limited appeal of the POD. The ALJ allowed WMA to intervene and ruled that WMA's limited "appeal" should be treated as a late-filed response to the timely appeals. Hambly and GSMOL filed a joint additional response (to WMA's pleading) on July 23. We have discussed the issues raised by these appeals herein, taking into consideration the various responses, and have revised the POD accordingly.

Findings of Fact

1. Hillsboro's receives from PG&E, on a monthly basis, a single master-meter bill for all gas and electric usage at the mobilehome park. The master-meter bill does not differentiate the tenants' individual usage and the common area usage (which includes streetlighting, the pool, and the clubhouse).

2. Though it is not calculated on the master-meter bill, the volumetric difference, on a therms/day or kWh basis, between the master-meter bill and the total of the submeter bills represents the common area usage.

3. Hillsboro does not bill tenants directly for common area usage but recovers these costs through the rent control process.

4. Hillsboro has provided no documentation and no alternative proxy (to that specified in finding 7) for common area gas and electric usage.

5. In calculating the NOIs, Novato has recognized submetered receipts as an allowed income item and subtracted, as an allowed expense item, the master-meter bill. These two items do not cancel one another, but on the other hand, their difference, on a dollar basis, does not provide an accurate measure of gas and electric common area usage.

6. Hillsboro has charged its tenants for common area and pedestal expenses in PG&E's service territory without obtaining Commission authorization to do so.

7. Computation of the rents which should have been charged requires the following NOI adjustments in both the base year and each petition year:

(a) exclude submetered gas and utility receipts as an item of gross income;

(b) exclude the total master-meter bill as an item of operating expenses; and

(c) allow, as an item of operating expenses, costs for all common area usage (measured in therms/day or kilowatt hours and multiplied by the mobilehome park master-meter rate schedule in the tariffs of Pacific Gas and Electric Company (PG&E) applicable to the time period at issue. For those years in which Hillsboro is unable to document the master-meter bill charges necessary to calculate the volume of common area usage, the tenants' estimate of 10% provides a proxy.

8. The $3,251 in utility expenses for electrical conduit and trenching in the 1996 petition must be disallowed in NOI calculations.

9. The $23,884 in utility expenses for electric pedestals in the 1998 petition must be disallowed in NOI calculations.

10. We reject the POD's recommendation that Hillsboro apply to Novato for a rent adjustment, in deference to Novato's position that its municipal rent control law does not expressly provide a mechanism for reopening final rent determinations.

11. The parties have all the information they need to promptly and accurately calculate the refunds owed.

Conclusions of Law

1. Hillsboro is the party which should have knowledge of the common area gas and electric usage.

2. Consistent with D.95-08-056, utility common area costs (such as electrical conduit and trenching) and electric pedestal costs should not be used as expenses in NOI calculations for the purposes of Novato's rent control ordinance.

3. Hillsboro should calculate the excess rents authorized on Hillsboro's 1996, 1997, and 1998 petitions under Novato's rent control ordinance in order to remove all rents assessed in violation of Public Utilities Code § 739.5. Hillsboro should perform these calculations in conformance with the determinations made herein.

4. In order to avoid violating § 739.5, Hillsboro should refund all excess rents paid by Hambly and the other Los Robles tenants. Hillsboro must refund the tenants the difference between the rents actually charged and the rents which should have been charged.

5. Excess rent should be refunded from January 13, 1997, since that is the date three years before the filing of the complaint, and should include interest at the prime three-month commercial paper rate, compounded monthly.

6. Hillsboro should make a good faith effort to identify and reimburse any former tenants or their heirs for excess rents paid since January 13, 1997, including interest.

7. All refunds not collected within 12 months of the date quantification is accepted by Hambly or approved by the Commission, as applicable, should revert to the General Fund of the State of California.

8. At the end of the 12-month period, Hillsboro should inform current tenants, by letter with a copy to the Director of the Commission's Consumer Services Division, of the status of its refund program and the steps it has taken to turn over any uncollected refunds to the General Fund.

9. Hillsboro should examine its practices at other mobilehome parks which it owns and which are located within the service territories of gas and electric utilities regulated by this Commission, amend its future rent control applications where appropriate, and implement refunds where warranted.

10. The two pending requests for official notice should be granted. (Hambly's December 7, 2000 filing and Hillsboro's January 11, 2001 filing) and the Commission also should take notice of PG&E's residential electric tariff rates in effect through year-end 1998.

11. In order to provide certainty to all parties, ensure that refunds are paid on a timely basis, and to provide guidance to Novato with respect to Hillsboro's 1999 rent adjustment petition, which is pending without decision by Novato, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint of Robert Hambly (Hambly) against Hillsboro Properties (Hillsboro) and the City of Novato (Novato) is granted to the extent set out in these ordering paragraphs.

2. Hillsboro, the owner of the Los Robles Mobilehome Park (Los Robles), shall calculate the excess rents authorized on Hillsboro's 1996, 1997, and 1998 petitions under Novato's rent control ordinance in order to remove all rents

assessed in violation of Pub. Util. Code § 739.5, in accordance with our determinations herein. Within 45 days of the effective date of this decision,

Hillsboro shall file a report with these calculations and shall serve it on the service list for this proceeding.

3. The excess rents Hillsboro must refund, on a pro rata basis to Hambly and the other Los Robles tenants who paid them, is the difference between the rents actually charged and the rents which should have been charged. In order to avoid violating § 739.5, the rents which should have been charged are to be calculated as follows:

a. The calculation of net operating income (NOI) in both the 1995 base year and each petition year shall be adjusted to (i) exclude submetered gas and utility receipts as an item of gross income; (ii) exclude the total master-meter bill as an item of operating expenses; and (iii) allow, as an item of operating expenses, costs for all common area usage (measured in therms/day or kilowatt hours and calculated in accordance with the mobilehome park master-meter rate schedule in the tariffs of Pacific Gas and Electric Company (PG&E) which were operative during the time periods at issue. For those years in which Hillsboro is unable to document the master-meter bill charges necessary to calculate the volume of common area usage, the tenants' estimate of 10% shall serve as a proxy.

b. The $3,251 in utility expenses attributable to electrical conduit and trenching from the 1996 petition shall be removed.

c. The $23,884 in utility expenses to electric pedestals from the 1998 petition shall be removed.

4. Rent refunds shall be paid for the period beginning January 13, 1997 and shall include interest at the prime three-month commercial paper rate, compounded monthly, until the date of refund.

5. Within 30 days of the date that Hillsboro files the report required by Ordering Paragraph 2, Hambly and Hillsboro shall meet and confer to discuss the inputs and methodologies used in making the calculations, in a good faith effort to explore and reconcile any differences between them.

6. Within 30 days of the meeting required by Ordering Paragraph 5, Hambly shall then file, in the alternative, a notice of acceptance of the calculations or separate calculations performed in accordance with our determinations herein.

7. Should Hambly file a notice of acceptance of the calculations, the Executive Director thereafter shall close this proceeding by Executive Director's order. Should Hambly file separate calculations, the administrative law judge (ALJ) assigned to this case shall order additional proceedings, as the ALJ determines necessary, to resolve the discrepancies between the parties.

8. Hillsboro shall reimburse its current tenants and shall make a good faith effort to identify and reimburse any former tenants or their heirs for excess rents paid since January 13, 1997, including interest as calculated above.

9. All refunds not collected within 12 months of the date quantification is accepted by Hambly or approved by the Commission shall revert to the General Fund of the State of California.

10. At the end of the 12-month period, Hillsboro shall inform current tenants, by letter with a copy to the Director of the Commission's Consumer Services Division, of the status of its refund program and the steps it has taken to turn over any uncollected refunds to the General Fund.

11. Hillsboro should examine its practices at other mobilehome parks which it owns and which are located within the service territories of gas and electric utilities regulated by this Commission, amend its future rent control applications where appropriate, and implement refunds where warranted.

12. The following two requests for official notice are granted: Hambly's December 7, 2000 filing and Hillsboro's January 11, 2001 filing. On our own motion, we also take notice of PG&E's residential electric tariff rates in effect through year-end 1998.

This order is effective today.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Attachment A

See CPUC Formal File